IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LFONSO HERRERA BOJORQUEZ,

No. 21938

Appellant,

vs.

WITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of California Honorable Dennis J. Donovan, District Judge

APPELIANT'S OPENING BRIEF

IANGFORD, IANGFORD & IANE By J. PERRY IANGFORD 439 Spreckels Building San Diego, California 92101

Telephone: 232-1053

Attorneys for Appellant

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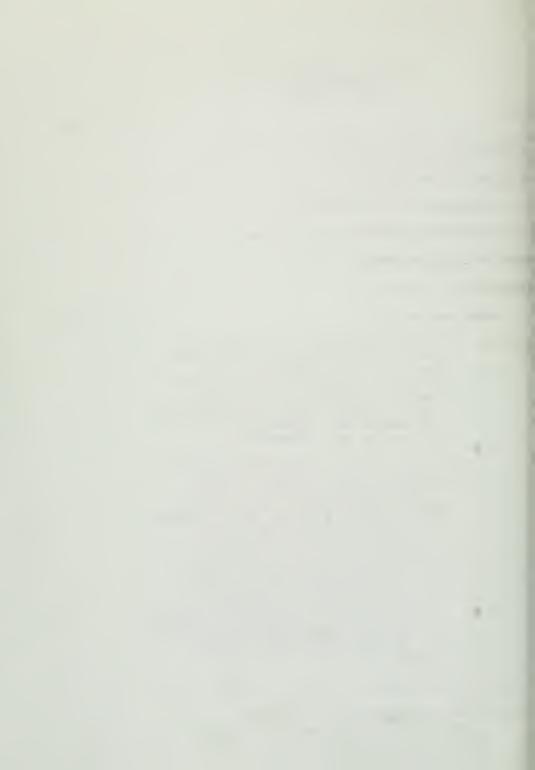


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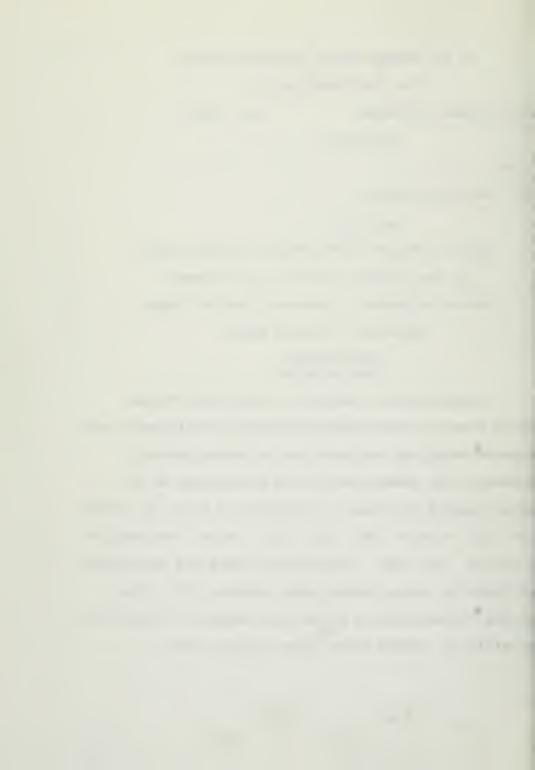
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Honorable Dennis J. Donovan, District Judge
APPELIANT'S OPENING BRIEF

JURISDICTION (Rule 18-2(b))

Appellant was indicted in the United States strict Court for the Southern District of California upon carges of smuggling marijuana and of concealing and scilitating the transportation and concealment of illigally imported marijuana in violation of Title 18, United Sates Code, Section 176a. (R. 2-3). He was convicted on the counts. (R. 7-8). The District Court had jurisdiction adder Title 18, United States Code, Section 3231. This curt has jurisdiction to review the judgment of conviction adder Title 28, United States Code, Section 1291.



STATEMENT OF THE CASE (Rule 18-2(c))

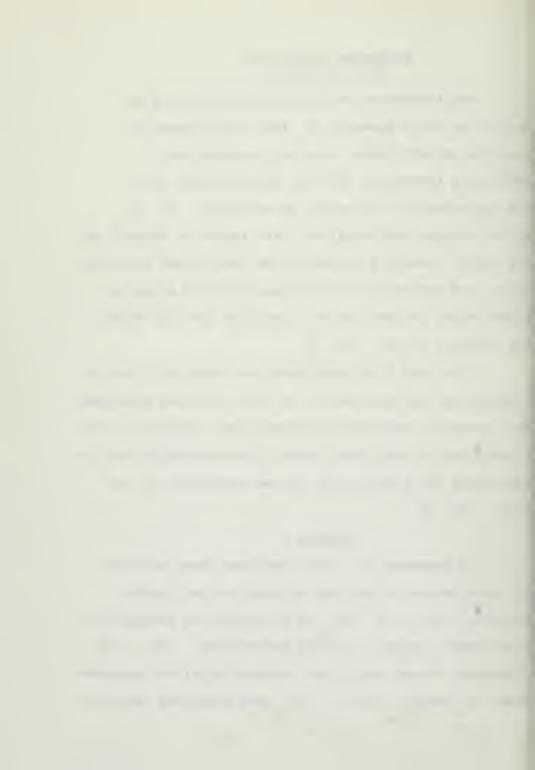
The indictment charged in Count One that appellant on or about December 12, 1966, with intent to defraud the United States, knowingly smuggled and cindestinely introduced into the United States from Mexico approximately 218 pounds of marijuana. (R. 2). Count Two charged that appellant with intent to defraud the Inited States knowingly concealed and facilitated the transportation and concealment of approximately 218 pounds of merijuana which he knew had been imported into the United States contrary to law. (R. 3).

In a jury trial appellant was found guilty as to onth counts of the indictment. (R. 7-8). He was committed the custody of the Attorney General for concurrent five ver sentences on each count, with a recommendation that he considered for parole prior to the expiration of the sentence. (R. 8).

Evidence

On December 12, 1966, appellant drove an automobile from Mexico to the Port of Entry at San Ysidro,
Elifornia. (R.T. 6-7, 13). He presented his immigration
End and made a negative customs declaration. (R.T. 7-9).

It inspector became suspicious, because appellant appeared
It shake or tremble. (R.T. 7,9). Upon searching the auto-



mbile customs officials discovered 218 pounds of marijuana concealed within the front door panels, within and under the rear seat, and in the panels below the rear windows.

(1.T. 9-10, 15-17, 50-54).

The automobile driven by appellant was registered in the name of Mr. and Mrs. Powell. It had been sold or taded to University Ford in San Diego and subsequently sold in a package deal with other used cars to Metorez Universal in Tijuana, Mexico, which at the time of trial was a dfunct agency. (R.T. 26).

Appellant was arrested and interrogated by customs cificers. He stated that he had picked up the vehicle in Ijuana after he had been contacted by one Roberto, a Mxican fellow, who had asked the defendant to bring the cr to the Mission Valley Car Wash where the defendant stated tat he had previously been employed. He was to ask for prmission to use the equipment at the car wash, polish the cr and return it to Tijuana. Appellant did not give the oficers Roberto's last name. The officer either thought o was certain that appellant stated that Roberto gave him \$0.00 to have the work done or to do it himself. (R.T. 22-2, 85). At the time of his arrest appellant had \$56.00 i his wallet. (R.T. 24).

According to Customs Agent Ellis the 218 pounds
o approximately 100 kilos of marijuana found in the



plantity of marijuana would be worth \$218,000.00 on the ilicit market in the United States. (R.T. 27). The ordinary fee to a, "mule", for driving an automobile load or marijuana across the border is \$20.00 to \$25.00. If they make a delivery in Los Angeles, they usually receive \$50.00 to \$100.00. (R.T. 86).

Appellant testified in his own behalf. He denied tat he knew there was marijuana in the automobile when he dove it to the border. (R.T. 62-63). On the day in Testion one Jose Roberto Guiterez delivered the automobile to him in Tijuana to take to San Diego to clean and polish i, and, if he had a chance, to wash the upholstery and cean the motor. He received \$20.00 for the work. Aderate facilities for cleaning the motor and certain cleaning products were not readily available to do the work in Tijuana. Appellant had been employed by the Minuteman Car wish in the Mission Valley section of San Diego, where it was his custom to bring automobiles from Tijuana to clean und polish. (R.T. 58-61).

Alfonso Rodriguez testified on direct examination
that he was the manager of the motor polishing department
the Mission Valley Car Wash. Appellant had been
ployed there, and Rodriguez did from time to time permit



him to use the equipment at the car wash to clean and plish automobiles which he brought from Tijuana. (R.T. 5-78).

Customs Agent Thane Ellis testified in rebuttal that there are car washing and motor cleaning facilities in Tijuana. (R.T. 85). He also stated, without objection by defense counsel, that he had talked with a Mr. Equilera, the manager of the Mission Car Wash in Mission Villey, who told him that appellant had been laid off approximately four months previously because of lack of with and that employees were not permitted to bring vhicles to wash on their own or to use the facilities for tat purpose. (R.T. 89). There is also a Minuteman Car Wish in Mission Valley, but appellant had referred to the Mission Car Wash at the time of his arrest. (R.T. 90).

On surrebuttal Mr. Rodriquez testified that he
ad appellant worked at the Minuteman Car Wash. (R.T. 92).

Questions Involved

- 1. Was the circumstantial evidence of appliant's knowledge of the presence of the marijuana in the automobile at the time he entered the United States of sflicient to enable a reasonable determination that it cludes every hypothesis except that of guilt?
- 2. Was appellant's Sixth Amendment right to the fective assistance of counsel violated, where his trial



counsel failed to make a motion for acquittal, failed to oject to inadmissible hearsay evidence which probably pejudiced his defense, and failed to effectively clarify fetual questions as to the application of the hearsay?



SPECIFICATION OF ERRORS (Rule 18-2(d))

- l. Appellant's sole defense in the trial court was that he did not know the marijuana was in the autombile. (R.T. 98). However, trial counsel failed to make a motion for acquittal. He objected to the introduction of the marijuana in evidence, but only upon the ground of a defect in the chain of custody. (R.T. 51-52). If appellant's contention is not sufficiently raised by its assertion as a defense in the trial court, then it must be urged as plain error.
- 2. The denial of appellant's right to effective representation of counsel was not raised in the trial curt. By their nature such objections are not ordinarily so raised, and under the applicable rules the inadequacy of representation must be so gross as to be regarded as pain error.

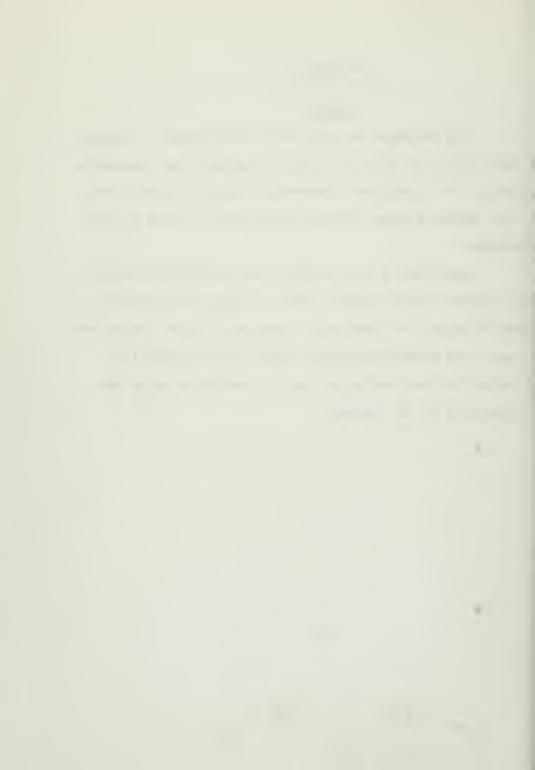


ARGUMENT (Rule 18-2(e))

Summary

The evidence of guilt was insufficient to support the conviction, in that it failed to exclude the reasonable typothesis that appellant innocently brought the marijuana into the United States without knowing that it was in the automobile.

Appellant's only defense was effectively emasculted, because trial counsel made no motion for acquittal, filed to object to inadmissible hearsay evidence which the jury may have thought destroyed appellant's credibility, and failed to take action to clarify confusion as to the applicability of the hearsay.



Ι

THE CIRCUMSTANTIAL EVIDENCE DOES NOT SUPPORT APPELLANT'S CONVICTION, BECAUSE IT IS INSUFFICIENT TO ENABLE A REASONABLE DETERMINATION THAT IT EXCLUDES THE HYPOTHESIS THAT APPELLANT INNOCENTLY IMPORTED THE MARIJUANA WITHOUT KNOWING THAT IT WAS IN THE AUTOMOBILE.

The evidence in the case at bar tending to show that appellant knew that the marijuana was in the automibile and intended to smuggle it into the United States was entirely circumstantial. The trial court so instructed the jury. (R.T. 112).

"While circumstantial evidence may support a conviction, it must be adequately sufficient to enable a reasonable determination that it excludes every hypothesis except that of guilt." (WHALEY vs. UNITED STATES, 362 F.2d 938, 939 (9 Cir. 1966); DAVIS vs. UNITED STATES, No. 21,354, F.2d, (9 Cir., August 17, 1967)).

In DAVIS the appellant was arrested after being clowed from the international border to the point of rest. From there she was transported in a sheriff's elicle. The next day heroin was found in the seat of the



sheriff's car where appellant had been sitting. The cificer having charge of the vehicle could not with crtainty exclude the possibility that the contraband was in the vehicle before Davis was transported, and despite repeated subsequent observations of the car, the contraband was not found until the next day. In these circumsances this Court held the circumstantial evidence insefficient.

The case at bar differs from DAVIS in that here te evidence excludes the possibility that the contraband ws placed in the automobile after appellant was separated fom it, but here there was much more opportunity for the mrijuana to have been placed in the car without appllant's knowledge before appellant started to drive it. The fact that DAVIS involved a sheriff's vehicle made it is probable there than here that some third party placed the contraband in the car. The fact that in the case at both the automobile had recently been in Mexico rather than if the United States in no way tends to increase the likelihood that the defendant rather than some other person paced the marijuana in the car.

Appellant has not contradicted the Government's eidence in any substantial respect. That evidence admits o at least two reasonable hypotheses. Either appellant suggled the marijuana, or the true smuggler adopted a



whereby appellant would unknowingly and innocently being the marijuana into the United States, and the suggler would retrieve it after it had been introduced.

The case for appellant's innocence is supported by his uncarradicted and corroborated explanation as to an innocent reson for bringing the car to the United States. Moreover, it view of the Government's practice of trading, "tax cants", for information about smuggling confederates, pubfessional smugglers are probably motivated to carry on thir activities in such a fashion that the person doing the tunsporting has as little information as possible to give. That would be best achieved by using a wholly innocent, "rule".

Although he insists he is not, appellant in the case at bar might be guilty. However, the evidence against him is wholly circumstantial. The hypothesis of innocence are is far more convincing than it was in DAVIS. Therefice, the evidence is insufficient to support a finding of guilt, and the judgment must be reversed.



APPELIANT WAS DENIED THE EFFECTIVE
ASSISTANCE OF COUNSEL, BECAUSE TRIAL
COUNSEL FAILED TO ASSERT APPELIANT'S
DEFENSE, IN THAT HE DID NOT MAKE A
MOTION FOR ACQUITTAL OR OTHERWISE
ASSERT THE LEGAL INSUFFICIENCY OF
THE EVIDENCE AGAINST APPELIANT, DID
NOT OBJECT TO INADMISSIBLE HEARSAY
OFFERED FOR THE PURPOSE OF DISCREDITING
THE DEFENSE, AND DID NOT TAKE ANY
EFFECTIVE STEPS TO CLEAR UP A STATE
OF COMPLETE CONFUSION IN THE RECORD
AS TO THE SIGNIFICANCE OF THE HEARSAY.

This Court has repeatedly held that:
"To constitute denial of the effective assistance of counsel guaranteed by the Sixth Amendment counsel must have been so incompetent or inefficient as to make the trial a farce or a mockery of justice." (PEEK vs. UNITED STATES, 9 Cir. 1963, 321 F.2d 934, 944. See also REID vs. UNITED STATES, 9 Cir. 1964, 334 F.2d 915, 919; BOUCHARD vs. UNITED STATES, 9 Cir. 1965, 344 F.2d 872, 874).

wha showing can be made in few cases. Appellant expectfully submits that his is one of those few.

We have argued above that the evidence in the all all are at bar is legally insufficient under the applicable to support a conviction. Although trial counsel



Harly took the position that the evidence did not stablish knowledge of the marijuana by his client, he at a time made a motion for acquittal or adopted any other procedure which would have enabled the trial court to pass upon the issue. Even a minimum defense required such a mation, both to give the trial court an opportunity to less upon the issue and to protect the defendant's rights or appeal.

During redirect examination of Customs Agent

Nume Ellis by the Government on rebuttal, the following
occurred:

"BY MR. MILAM:

"Q. Did you check to see the Minuteman Car Wash in Mission Valley? Did you check that out at all?

"A. Yes. I called the manager, a Mr. Esquilera, of the Mission Car Wash in Mission Valley, yes; and I talked to him concerning the defendant.

"Q. Did you find out anything?

"A. He told me that Mr. Bojorquez had been laid off approximately four months ago because of the lack of work. I also discussed the point



of bringing automobiles and other vehicles into that area, and he said it was absolutely nay to all employees to bring any vehicles in the area to wash on their own; also, that they did not grant facilities to any persons to use their equipment to make -- for cleaning other cars."

(R.T. 89).

Tis evidence, although it was clearly inadmissible harsay, was received without any objection by appellant's tial counsel. The failure to object is evidence of gross iadequacy of representation.

Having let the hearsay in, trial counsel was confronted with another question which he utterly failed to met. Did the hearsay declaration refer to the same car wish about which appellant and Mr. Rodriguez testified?

As appears from the quoted portion of the transcipt, counsel for the Government asked about the Minuteman Cr Wash in Mission Valley, while Agent Ellis responded wth reference to the Mission Car Wash in Mission Valley.

(1.T. 89). On re-cross defense counsel elicited from M. Ellis the fact that there are two car washes. (R.T. 9). Ellis also said that in the interrogation at the tme of appellant's arrest, appellant referred to the



ission Car Wash. (R.T. 90). However, appellant testiid that it was the Minuteman. (R.T. 59). To complicate
afters further, on direct examination, Rodriguez said
that he worked at Mission Valley Car Wash, but on
wrebuttal it was Minuteman Car Wash in Mission Valley.
RT. 75, 92).

Manifestly, these facts have an explanation.

When the hearsay referred to the car wash to which appellant said he was going at the time of his arrest, or it in not. Having let the hearsay in, defense counsel was maker a practical necessity of taking one position or the other. His witnesses were clearly able to testify whether coriguez and Esquilera worked at the same car wash and, fnot, whether appellant had worked at both.

Although the burden of proof was at all times in the Government, after appellant was put to his defense, the Government's strongest case could be made by showing that appellant had made false statements either during his original interrogation or at the trial. It is not unliely -- indeed it is very probable -- that appellant was covicted by the jury on the theory that he was impeached by the hearsay statement of the car wash manager to Agent that employees were not permitted to wash autocoiles on their own. If appellant's trial counsel had beformed his duty, this never could have happened. Aside



from the fact that a motion for acquittal should have been granted at the conclusion of the Government's case and that the hearsay should not have been admitted in any event, it seems more probable than not that the hearsay did not even refer to the car wash in question, but related to another, at which appellant had worked before he was employed at the one in question. A conviction obtained under such circumstances is surely a mockery of justice.



CONCLUSION

The evidence in the case at bar conclusively etablished that appellant drove an automobile carrying wrijuana from Mexico to the United States. The evidence to the united states indicate that he did so with knowledge of the presence of the marijuana and intent to smuggle was wholly incumstantial. That evidence was insufficient to exclude the reasonable hypothesis that he did so innocently and without knowledge that the marijuana was in the car.

Appellant testified to an innocent reason for singing the automobile into the United States and produced croborative evidence. A motion for acquittal should be been granted, had his trial attorney made such a cion. He might well have been acquitted by the jury, his counsel not permitted the introduction of inchissible hearsay and then failed to use his witnesses to bright confusion as to whether the hearsay was even applicable to the issue. These failures and omissions made mockery of a good defense. The judgment of conviction had be reversed.

Respectfully submitted,

LANGFORD, LANGFORD & LANE

By

J. Perry Langford

Attorneys for Appellant



CERTIFICATE (Rule 18-2(g))

I certify that, in connection with the preparation c: this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Perry Langford

